

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

MARK A. ARTHUR, CIRILO)	
MARTINEZ, PARI NAJAFI and)	
HEATHER MCCUE on behalf of)	
themselves and all others)	NO. C10-198JLR
similarly situated,)	
)	SEATTLE, WASHINGTON
Plaintiffs,)	SEPTEMBER 14, 2012
)	
v.)	
)	
SALLIE MAE, INC.,)	<u>MOTION HEARING</u>
)	
Defendant.)	

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES L. ROBERT
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiffs: MR. JONATHAN D. SELBIN
MS. BETH E. TERRELL
MS. ALISON STOCKING
MR. MATTHEW R. WILSON

For Defendant: MS. JULIA B. STRICKLAND
MS. LISA M. SIMONETTI
MR. ERIC D. REICIN

For Intervenor MR. DARRELL PALMER
Judith Harper and MR. BRIAN J. TRENT
Objectors Sweeney
and McBean:

Reported by: Kari McGrath, CCR, RMR, CRR
Federal Court Reporter
206.370.8509
kari_mcgrath@wawd.uscourts.gov

PROCEEDINGS

THE COURT: Please be seated. The clerk will call this matter.

THE CLERK: Case C10-198, Mark Arthur versus Sallie Mae.

Counsel, please make your appearances.

MR. SELBIN: Good afternoon, Your Honor. Jonathan Selbin from Lief Cabraser Heimann & Bernstein on behalf of plaintiffs and the proposed class.

THE COURT: Thank you.

MS. TERRELL: Good afternoon. Beth Terrell from Marshall Daudt & Willie on behalf of plaintiffs and the proposed class.

MS. STOCKING: Good afternoon. Alison Stockins, Lief Cabraser Heimann & Bernstein on behalf of the plaintiffs and proposed class.

MR. WILSON: Good afternoon, Your Honor. Matt Wilson from Meyer Wilson on behalf of plaintiffs and the proposed class.

MS. STRICKLAND: Good afternoon, Your Honor. Julia Strickland from Stroock & Stroock & Lavan on behalf of defendant Sallie Mae.

THE COURT: Thank you.

MS. SIMONETTI: Good afternoon, Your Honor. Lisa

1 Simonetti, Stroock & Stroock & Lavan, on behalf of defendant
2 Sallie Mae.

3 MR. REICIN: Good afternoon. Eric Reicin, deputy
4 general counsel for Sallie Mae.

5 MR. PALMER: Good afternoon, Your Honor. Darrell
6 Palmer on behalf intervenor Judith Harper and objectors
7 Sweeney and McBean.

8 MR. TRENZ: Good morning, Your Honor. Brian Trenz on
9 behalf of intervenor Judith Harper.

10 THE COURT: Counsel, there are four matters before me
11 today, and I'm going to take them in the order that makes
12 sense to me, which will be, first, to take up Docket 251,
13 which is the motion for revocation of court's order granting
14 admission pro hac vice to Darrell Palmer. That will be
15 followed by Docket 232, motion for attorneys' fees filed by
16 intervenor Judith Harper. Third will be Docket 219, motion
17 for final approval of amended class action settlement. And
18 then last will be the motion for attorneys' fees and costs
19 and service awards in connection with the amended class
20 action settlement.

21 I will tell you that I will definitively rule on the
22 motion for revocation. I will definitively rule on
23 Ms. Harper's motion for attorneys' fees. I will give you my
24 oral indication of granting or denying the motion for final
25 approval of class action settlement, and the motion for

1 attorneys' fees and costs. Those will be confirmed by a
2 written order which will have further detail to it. So that
3 will be our schedule for the day.

4 Mr. Palmer, why don't you go to the podium, since I would
5 like to hear from you. Mr. Palmer, you filed in connection
6 with this matter a declaration of Darrell Palmer in support
7 of Ms. Harper's motion for award of attorneys' fees and
8 costs, and it's in the form of a declaration of some six
9 pages, signed under penalty of perjury.

10 Is there anything in that declaration that you want to
11 change before I rule on the motion?

12 MR. PALMER: This is the declaration in connection
13 with the application for attorneys' fees, Your Honor?

14 THE COURT: Yes.

15 MR. PALMER: I don't have that in front of me. I
16 couldn't answer that question at this time.

17 THE COURT: Well, you signed it under penalty of
18 perjury.

19 MR. PALMER: Yes.

20 THE COURT: And you reviewed it before you signed it?

21 MR. PALMER: Yes.

22 THE COURT: You believed everything in it was true at
23 that time?

24 MR. PALMER: I believe so.

25 THE COURT: All right. Well, this is my issue then:

1 Paragraph 5, quote, "I notified the court of the foregoing
2 deficiencies during the December 17, 2010, conference call
3 between the court and all counsel. As a result, the court
4 ordered that class and defense counsel look into the
5 'missing' class members and report back to the court
6 immediately. The district court also extended all deadlines
7 for the settlement."

8 Do you have any reason to believe that that isn't your
9 account of what happened?

10 MR. PALMER: This was for December of 2010?

11 THE COURT: December 17, 2010.

12 MR. PALMER: I don't think I was -- I don't think I
13 participated in that call, Your Honor.

14 THE COURT: I don't think you did either. First off,
15 there was no call.

16 MR. PALMER: Right.

17 THE COURT: It was a court hearing.

18 MR. PALMER: Right.

19 THE COURT: You didn't show up. You didn't speak.

20 MR. PALMER: Correct.

21 THE COURT: How can you tell me, "I notified the
22 court of the foregoing deficiencies during the December 17,
23 2010, conference call"?

24 MR. PALMER: Well, I think it's either an error in
25 the date, or it's referring to the objections that we filed.

1 THE COURT: "I notified the court of the foregoing
2 deficiencies during the December 17, 2010, conference call."
3 That is a flat-out statement, sir.

4 MR. PALMER: Yes.

5 THE COURT: Is it true?

6 MR. PALMER: There was no call, that I recall.

7 THE COURT: In your declaration, you state, "I am the
8 lead partner at the Law Offices of Darrell Palmer." That
9 could be good, since it's named after you. And apparently
10 you have a Kira Rubel, senior associate, who is mentioned on
11 page 4 --

12 MR. PALMER: Correct.

13 THE COURT: -- as having worked 272 hours in this
14 matter.

15 MR. PALMER: That's right.

16 THE COURT: And in pleadings which she has filed with
17 this court, it lists her as having applied for and been
18 granted pro hac vice status.

19 MR. PALMER: That would be incorrect. She has not
20 yet applied for pro hac vice status in this court.

21 THE COURT: Then why is she signing pleadings
22 submitted to this court?

23 MR. PALMER: I think the one pleading that she
24 signed, as I recall, was done at a time when I was
25 unavailable to sign it.

1 THE COURT: Is it a regular practice in your law firm
2 to have someone engage in unauthorized practice of law by
3 signing pleadings in courts where they are not admitted?

4 MR. PALMER: No, sir.

5 THE COURT: All right. You may be seated. Thank
6 you.

7 The ruling of this court will be as follows: Plaintiffs
8 move the court to revoke Darrell Palmer's pro hac vice
9 admission on the grounds that he made a false statement in
10 his pro hac vice application.

11 My colleague, Judge Coughenour, on August 17, 2012, denied
12 Mr. Palmer's pro hac vice application for the reason of
13 containing the same false statement and, secondly, because,
14 in part, Mr. Palmer blamed his assistant for the error.
15 Those of us who know Judge Coughenour well know that that
16 would never be a good idea.

17 Mr. Palmer represents that it was an innocent mistake on
18 his part in connection with his application in this matter,
19 and has submitted an amended application that corrects the
20 false statement. He also takes full responsibility for the
21 error, while stating, quote, "Mr. Palmer's office made an
22 inadvertent error."

23 It is undisputed that Mr. Palmer made a false statement in
24 his pro hac vice application. He declared under penalty of
25 perjury that he had, quote, "not been disbarred or formally

1 censured by a court of record or by a state bar association;
2 and there are no disciplinary proceedings against me," in the
3 record at Docket 97.

4 In fact, Mr. Palmer was temporarily suspended from the
5 Colorado Bar Association, the State Bar of Arizona, and the
6 State Bar of California as a result of a Colorado felony
7 conviction in the 1990s.

8 Pursuant to Western District of Washington Local
9 Rule 2(f)(3), an attorney may be subject to disciplinary
10 action for violation of the Standards of Professional
11 Conduct, including the Federal Rules of Civil Procedure.

12 Under Federal Rule of Civil Procedure 11, an attorney's
13 signature on a court filing certifies that to the best of the
14 person's knowledge, the facts presented in the documents have
15 evidentiary support, Federal Rule of Civil Procedure
16 11(b)(3).

17 Here, Mr. Palmer improperly certified and declared under
18 penalty of perjury that he did not have a disciplinary
19 history. As such, he violated the Standards of Professional
20 Conduct set forth in the local rules and is subject to
21 disciplinary action.

22 Mr. Palmer attempts to mitigate his error by
23 distinguishing the cases cited by plaintiff, explaining that
24 he was temporarily disbarred for conduct unrelated to the
25 practice of law, asserting that he meets the standards for

1 pro hac vice application in this district, taking
2 responsibility for his error, contending that his work
3 substantially benefitted the class, and maintaining that
4 plaintiffs have bad motives for bringing this action.

5 I have not conducted an independent investigation into the
6 Colorado Bar Association action, or Colorado conviction, and
7 I don't know if it was a disbarment or a suspension. But
8 everyone seems to describe it as either one or the other of
9 those.

10 MR. PALMER: So the record is clear, it was a
11 suspension, Your Honor.

12 THE COURT: Please don't interrupt me, sir. You are
13 in enough trouble already.

14 This misses the point that it is a civil rule violation
15 under Rule 11, not Mr. Palmer's suspension, that is at issue
16 in this matter. I really don't want to know about the facts
17 of the underlying proceeding. We will assume, since
18 Mr. Palmer is an officer of the court, that it was an
19 inadvertent problem.

20 However, in this matter, the conduct is unacceptable.
21 Mr. Palmer was alerted to the problem when his pro hac vice
22 application in Judge Coughenour's case was challenged. That
23 was on October 10, 2012 (sic). Mr. Palmer did not
24 immediately raise and seek to correct the same mistake in
25 this case. In fact, plaintiffs waited ten days before filing

1 their motion to give Mr. Palmer time to raise and correct the
2 issue.

3 Mr. Palmer did not file an amended pro hac vice
4 application until August 27, 2012, a full 17 days after being
5 notified of the problem. This does not demonstrate candor
6 with the court or that he took seriously the fact that he
7 made a false statement under oath.

8 Additionally, Mr. Palmer has apparently submitted false
9 pro hac vice applications in at least three other cases. As
10 a final note, the false statement in the pro hac vice
11 application is not the only misrepresentation Mr. Palmer has
12 made to this court. It is impossible to reconcile a
13 declaration submitted to this court under penalty of perjury,
14 dated May 17, 2012, with the court record. And Mr. Palmer
15 has now acknowledged that it is incorrect. That serves as
16 the basis for his fee application in this matter.

17 As will be further discussed today, Mr. Palmer made
18 several other misrepresentations in his motions for
19 attorneys' fees. These misrepresentations confirm my
20 conclusion that the court sanction Mr. Palmer by revoking his
21 admission in this case. Therefore, Docket 251 is granted,
22 and Mr. Palmer's pro hac vice is revoked.

23 Let me then take up next the question of the motion for
24 attorneys' fees by Judith Harper.

25 I'm not having argument, counsel. I'm ruling from the

1 bench.

2 MR. TRENZ: I apologize.

3 THE COURT: Are you admitted?

4 MR. TRENZ: Yes, Your Honor, I am.

5 THE COURT: Good. I'm glad to hear we got one right.

6 Under certain circumstances, attorneys for objectors may
7 be entitled to attorneys' fees from the common fund.

8 Objectors may claim the entitlement to fees on the same
9 equitable principle as class counsel when their objections
10 result in an increase to the common fund or otherwise
11 substantially benefit the class.

12 Where objectors do not add any new legal argument or
13 expertise and they do not participate constructively in the
14 litigation or confer a benefit on the class, they are not
15 entitled to an award premised on equitable principles, the
16 *Rodriguez versus Disner* case, 688 F.3d 645-658, Ninth
17 Circuit, 2012.

18 Ms. Harper seeks an award of \$1,116,250 in attorneys'
19 fees, \$7,805.04 in costs, and a \$3,000 service award.

20 Ms. Harper arrives at the approximately \$1.1 million fee
21 award by taking 25 percent of \$4.65 million, representing the
22 increase in the value of the fund after the additional class
23 members were discovered. Under the lodestar cross-check, she
24 requests a multiplier of 4.51. She maintains that the
25 requested fees are warranted because her actions directly

1 resulted in this benefit to the class.

2 Ms. Harper's counsel asserts that their actions resulted
3 in the following benefits to the class: Number one, during a
4 December 17, 2010, conference call, they notified the court
5 of their fear that the parties had effectively left out a
6 portion of eligible class members from the original notice.
7 That is found in the Harper fee motion at page 2.

8 Mr. Palmer specifically states in his declaration, "I
9 notified the court of the foregoing deficiencies during the
10 December 17, 2010, conference call between the court and all
11 counsel. As a result, the court ordered that class and
12 defense counsel look into the 'missing' class members and
13 report back to the court immediately." Palmer declaration,
14 which is found in the docket at 232-1, paragraph 5.

15 Ms. Harper's counsel does assert that their observation
16 directly resulted in over 3 million additional class members
17 being discovered. We now know, as has been admitted by
18 counsel today, that those statements are false.

19 Second, they identify the fact that the original
20 settlement agreement did not provide monetary benefit to
21 class members who were 180 days or more delinquent but who
22 had since paid off their debt, in the Palmer declaration at
23 paragraph 4. They identified the fact that "charged-off"
24 class members were not provided monetary relief, Palmer
25 declaration at paragraph 4.

1 They identified the issue in the original settlement that,
2 although the lawsuit complained only of the statutory
3 violations committed by Sallie Mae, the settlement included
4 all released parties, Palmer declaration at paragraph 4.

5 The settlement agreement addressed the following
6 deficiencies identified by Ms. Harper's counsel: Clearly
7 identifying the fact that the settling defendants included
8 all released parties; permitting monetary recovery to those
9 who were over 180 days late in making payments but who have
10 since paid off their debt; three, ensuring that all class
11 members received adequate notice of the settlement; and,
12 four, increasing the common fund to reflect the increase in
13 class membership.

14 Finally, they claim the court instructed the parties to
15 revise the revocation form in accordance with Ms. Harper's
16 counsels' suggestion prior to making it available to the
17 class.

18 Despite Ms. Harper's counsels' contention, they did not
19 directly add to the discovery of additional class members.
20 Sallie Mae's Rule 30(b)(6) deponent, Michael Walter,
21 testified that Sallie Mae realized its error after internal
22 counsel asked Mr. Walter to research a Sallie Mae borrower's
23 account and see if they were on the original notice list and
24 found that they were not on that list.

25 Mr. Walter further testified that Sallie Mae discovered

1 additional class members who were omitted from the original
2 notice when internal counsel asked Mr. Walter to research a
3 borrower that had a potential lawsuit with Sallie Mae.
4 Plaintiffs have submitted persuasive evidence that neither
5 Ms. Harper nor her counsel had anything to do with the
6 discovery of the additional class members.

7 As we have already discussed, Mr. Palmer makes the bald
8 assertion, in fact, a statement, in his declaration that he
9 notified the court of the deficiencies during a nonexistent
10 December conference call. As a result, the court was
11 supposed to have ordered the class and defense counsel look
12 into class members.

13 The transcript of the December 17, 2010, in-court hearing
14 indicates that Mr. Palmer did not speak at all during the
15 hearing, and the court did not order the parties to
16 investigate any, quote, "missing," unquote class members.

17 Instead, it shows Mr. Dashiak, not Mr. Palmer, on behalf
18 of objectors McSweeney, Heath, and McBean, asserted that no
19 notice had been sent to class members in relationship with
20 affiliates or subsidiaries of Student Loan Marketing,
21 including Arrow Financial.

22 Counsel for Sallie Mae responded that notice had been sent
23 to these class members. Counsel did not at that time know of
24 the additional class members. In short, Ms. Harper's counsel
25 did nothing that resulted in the discovery of the additional

1 class members. Furthermore, class counsel, not Ms. Harper's
2 counsel, negotiated the additional \$4.65 million in the fund,
3 and are therefore responsible for that added benefit.

4 Ms. Harper's counsels' contention that they added a
5 substantial benefit to the class by identifying the fact that
6 "charged-off" members are not provided monetary relief and
7 identifying the issue that the settlement included all
8 released parties is unavailing. The court rejected
9 Ms. Harper's objection regarding the "charged-off" class
10 members, and there is no indication that any change between
11 the original settlement and the amended settlement relating
12 to the released parties added any benefit to the class.

13 Further, Ms. Harper's counsel makes yet another
14 misrepresentation when they asserted that the court
15 instructed the parties to revise the revocation request form
16 in accordance with counsel's suggestion. The court did no
17 such thing. See the court's order of January 10, 2012, at
18 page 20.

19 The only benefit that Ms. Harper's counsel provided to the
20 class was pointing out that the original settlement did not
21 provide a monetary benefit to class members who were 180 days
22 or more delinquent but who had since paid off their debt.
23 This was a suggestion adopted by the parties in the amended
24 settlement, and it has provided a benefit to those class
25 members who are now able to receive a cash award.

1 Nevertheless, there is insufficient evidence in the record
2 for the court to conclude that this suggestion resulted in a
3 substantial benefit to the class so as to warrant attorneys'
4 fees. For example, there is no evidence regarding how many
5 class members will benefit from this change. As such, it
6 does not warrant any award of attorneys' fees and costs.

7 There are additional factors, counsel, against awarding
8 attorneys' fees and costs to Ms. Harper's counsel. First of
9 all, many of their motions since the motion to intervene have
10 been rejected by the court, suggesting that the actions were
11 to disrupt and delay, which is consistent with the fact that
12 Mr. Palmer is a, and I'll use the phrase "professional" not
13 in any favorable sense, objector. I believe that he has
14 previously been labeled that by one of my colleagues.

15 Second, counsel has made at least three misrepresentations
16 to the court in their motions for attorneys' fees, in
17 addition to the false statement on the pro hac vice
18 application.

19 Finally, the motion for attorneys' fees, a very
20 significant document, is signed by Kira Rubel, who represents
21 to the court that she is admitted pro hac vice, in addition
22 to Mr. Palmer, who now says that he wasn't there. Ms. Ruble
23 has not been admitted pro hac vice. Therefore this is
24 another misrepresentation.

25 Finally, even if the court deems it appropriate to make

1 some award of attorneys' fees here, Ms. Harper's counsel
2 bears the burden of documenting the appropriate hours and
3 providing support for those hours and the hourly rate. And
4 her support is far too bare-boned and inadequate to satisfy
5 this burden.

6 Finally, it is highly questionable whether Ms. Harper even
7 has standing in this action. Although Ms. Harper has
8 testified and presented declarations that she received 40 to
9 50 calls from Arrow Financial on her cell phone in violation
10 of the TCPA, Sallie Mae has presented a declaration that
11 Arrow Financial only has records of calling Ms. Harper's home
12 and fax lines.

13 Consistent with the findings in other judicial districts,
14 based on the submissions of the parties, the court finds
15 Sallie Mae's declaration has more credibility than Ms. Harper
16 for the following reasons:

17 Ms. Harper has not produced phone bills establishing the
18 alleged calls, even though Sallie Mae has requested them and
19 that would definitively resolve the matter in her favor; two,
20 Ms. Harper has made a false statement in a declaration that
21 she received a voicemail on December 3, 2010, when in fact
22 she received that voicemail in December 2008, paren, she now
23 claims this was simply a mistake, but it was once again in a
24 declaration submitted to the court; and, finally, Arrow
25 Financial has records that indicate it made a call to

1 Ms. Harper's home number on December 3, 2008, at the precise
2 time of the voice message Ms. Harper contends was left on her
3 cell phone.

4 For these reasons, I would resolve any factual disputes
5 regarding Ms. Harper's standing in favor of Sallie Mae, and
6 do not believe that she has standing in this matter.

7 Because Ms. Harper's counsel has not established their
8 entitlement to an attorneys' fee award, there is no reason to
9 award Ms. Harper a service award of \$3,000.

10 In sum, the court denies Ms. Harper's motion for
11 attorneys' fees, costs, and a service award.

12 We will now turn to the third motion, which is the motion
13 for final approval of the amended class action settlement. I
14 will hear from the plaintiffs first.

15 MR. SELBIN: Thank you, Your Honor. May it please
16 the court. Jonathan Selbin, Lief Cabraser Heimann &
17 Bernstein, on behalf of plaintiffs in the proposed class.

18 I know the court knows the history of this case
19 intimately. I'm not going to walk through that history or
20 all of the aspects of the settlement. I'm going to very
21 briefly summarize a few points, and then I'm happy to answer
22 any questions the court may have, if that's acceptable.

23 THE COURT: Do your summary. I would like to hear
24 you address by category the objectors.

25 MR. SELBIN: Okay. I can do that, Your Honor. Very

1 briefly, to focus on the summary for a moment, we think this
2 is an outstanding settlement. We recognize it's been
3 somewhat of a long road to get from there to here. But we're
4 here, and we think it's time to bring this case to an end.

5 We are proud to present this settlement to the court for
6 its final approval. It provides core relief to all 8 million
7 class members, all of whom had the right -- many of whom
8 exercised the right to stop the phone calls that were at
9 issue here and to do so by the submission of a very simple
10 form. Some 100,000 -- just shy of 100,000 individuals
11 elected that remedy.

12 In a case about statutory damages, in other words, no
13 actual injury, no personal injury, no property damage, no
14 economic loss even, a case about statutory damages, Sallie
15 Mae is paying \$24.15 million.

16 There is a declaration in front of Your Honor from the
17 claims administrator, Jennifer Keough, with all of the final
18 claims data in it. And it provides that, based on the claims
19 that they've processed and all the information they have,
20 they estimate that the class members will receive somewhere
21 between \$110 and \$120 each. The best bet is something like
22 \$116 each. I know that was an issue of concern for Your
23 Honor back in December of 2010, what those numbers would look
24 like. We noticed the class at \$20 to \$40, to be on the
25 conservative side. In fact, the payoff is going to be about

1 \$116 each.

2 Direct notice -- individual direct notice was provided to
3 almost 95 percent of the class. This isn't a case where we
4 have to worry that class members didn't get notice. This
5 wasn't a publication notice case. This was a case where we
6 knew the names and addresses and e-mail addresses of just shy
7 of 95 percent of the class. Most of those people got notice
8 twice as a result of the original settlement and the amended
9 settlement.

10 The overwhelming class member response has been positive.
11 The numbers are in front of Your Honor. But just to walk
12 briefly through them, we've had 163,250 individual, unique
13 claims filed. We've had 99,860 revocation requests
14 submitted. A total of 171,263 unique individuals have chosen
15 to participate in one form or the other. So there's a lot of
16 overlap in those numbers. But it's a total of 171,263
17 individuals. We've had 35 objectors that were set out in 28
18 total objections. But there were 35 individual class members
19 who objected. We've had 395 opt-outs.

20 We've had no state Attorney General objections, as Your
21 Honor may be familiar with these days, under CAFA, because we
22 send out a notice to all the state AGs. And I think that was
23 accomplished here on three occasions as a result of various
24 changes that took place. And many of those state AGs are
25 typically very active these days. They are heard from in

1 cases where they see a problem. We have had no objections or
2 even calls or concerns from any state's Attorney General
3 about this settlement.

4 Most of the objections, Your Honor -- I can walk through
5 them more specifically, but the overwhelming majority of them
6 are of the "The settlement could have been more money"
7 nature. We think the case law is pretty clear as to why
8 that's not a valid generic objection to make.

9 Your Honor asked us to brief, and we did brief, on
10 preliminary approval, after the initial denial of preliminary
11 approval, the comparison of the value of the settlement to
12 the potential damages.

13 And as we walk through there, Your Honor, it's hard to
14 come up with numbers here that's less than billions and
15 billions of dollars, if we were to win the case at the end of
16 the day and maintain it on appeal and go all the way up.

17 That's part of the problem with these cases, frankly, is
18 that they are statutory damages cases, where the numbers get
19 very large very quickly, to the point that they would be
20 annihilating damages for many of these defendants, which of
21 course would give the defendant every incentive to litigate
22 all the way up as far as they could for as many years as they
23 could. And I think they would tell you it raises due process
24 issues for them.

25 So it's not a case where we can say the class has suffered

1 X million dollars in actual damages, and we recovered some
2 percentage of that. To some degree, the dollars recovered
3 have to be looked at as whether it's a reasonable amount of
4 money to pay to this class based on how much each class
5 member is getting.

6 And as I indicated, for a case involving statutory damages
7 only, the \$115, \$116 class members will get, in conjunction
8 with the core prospective relief, we think is more than
9 adequate and reasonable.

10 A few of the specific objections, Your Honor, you've
11 addressed many of them in your preliminary approval order,
12 actually, it's Docket 206, in which you denied preliminary
13 approval, but you analyzed many of the objections and
14 overruled them at that time and ordered us to go back and fix
15 a couple of notice issues.

16 The issue of the allocation regarding "charged-off" class
17 members, the fact that no money is allocated to "charged-off"
18 class members, Your Honor addressed that at length in
19 Docket 206, at pages 21 through 23.

20 The short answer is, as the Ninth Circuit said in the *Mego*
21 litigation, it is appropriate to allocate no damages to class
22 members who have significantly weaker claims, so long as
23 there is a principled basis for doing so. We explained those
24 principled bases, and the court has already adopted those in
25 its previous findings.

1 We've briefed the various issues relating to the
2 revocation form. I'm not sure Your Honor needs to hear about
3 those again. There is talk about the prospective relief and
4 whether it's meaningful. Obviously, that's the central issue
5 in this entire case, is whether Sallie Mae is entitled to
6 make these phone calls or not.

7 To suggest that requiring people to go and check a form
8 and say, "Stop calling me," is somehow an illusionary relief
9 is just not accurate. And the court made that finding
10 already as well.

11 So I don't know if Your Honor needs to hear about any
12 other specific objections. I'm prepared to address them if
13 you need to.

14 THE COURT: No, that's fine. Thank you.

15 MR. SELBIN: Thank you, Your Honor.

16 THE COURT: Ms. Strickland, are you speaking on your
17 side?

18 MS. STRICKLAND: Your Honor, I am speaking on our
19 side. But, candidly, I have very little to add, unless Your
20 Honor has specific questions.

21 THE COURT: I don't.

22 MS. STRICKLAND: Thank you.

23 THE COURT: All right. As I indicated, I am taking
24 that one under advisement. Counsel, you should be aware
25 that, unless I see something in the final order that changes

1 my mind, I will be approving the settlement.

2 Let's go then to the motion for attorneys' fees, costs,
3 and service award.

4 MR. SELBIN: Thank you, Your Honor. Jonathan Selbin
5 again. Very briefly here, Your Honor is aware that we are
6 seeking a fee out of the common fund here. This is not a
7 lodestar multiplier fee situation. Although, of course Your
8 Honor is required to engage in that as a cross-check on the
9 common fund.

10 I know Your Honor knows the benchmark of the Ninth Circuit
11 is 25 percent. We are seeking below the benchmark in this
12 case. By one measure, we're seeking 20 percent of the
13 24.15 million. It actually is about 19 percent, because
14 we're not seeking the 20 percent plus costs; we're seeking
15 the 20 percent with the costs included. So if you walk
16 through the math, it ends up being 19 percent, approximately,
17 of the total fund.

18 In terms of the lodestar cross-check, the multiplier,
19 we're seeking -- and this is on time just through April 30,
20 2012, which is the cutoff date we used. There's obviously
21 been substantial additional time, and will be substantial
22 additional time as we oversee the mailing of the claims --
23 the claims processing and the mailing of the checks.

24 THE COURT: What do you estimate that substantial
25 time will be?

1 MR. SELBIN: Over time? You know, Your Honor, it's
2 been --

3 THE COURT: Since the application was filed.

4 MR. SELBIN: Oh, since the application. You know,
5 Your Honor, we could run those numbers for you, if you would
6 like them. I don't even have a ballpark sense. It's all
7 been surrounding the final approval papers and responding to
8 the various motions from the Harper counsel and those sort of
9 things. I don't -- I can't represent to the court what that
10 number is.

11 THE COURT: Would you say that it's under 400 hours?

12 MR. SELBIN: Oh, I think it's probably under
13 400 hours. I think that's probably right, Your Honor. In
14 terms of how much more time we will have to devote, I do know
15 from experience that there will be many additional hours in
16 overseeing the work of the Garden City Group, who is
17 administering the claims program, assisting class members.
18 We get class member calls all the time, and we work very
19 closely with class members to help them through the process.

20 So there will be additional time. Again, it's not
21 possible to really quantify that, other than to say that that
22 amount of time as well will further reduce the lodestar
23 multiplier.

24 But as of April 30, 2012, the multiplier was 2.59. In
25 terms of a cross-check multiplier, that's a very reasonable

1 multiplier. If we were seeking an award just on our lodestar
2 under that method, we think that would be a reasonable
3 multiplier. But certainly as a cross-check, it's well within
4 the range of 1 to 4, which the Ninth Circuit has said is the
5 typical multiplier in these sorts of situations. And we
6 think it's justified.

7 In terms of -- and I can walk through the additional
8 factors, but it's all in our briefs, so I --

9 THE COURT: Well, let me ask you my question.

10 MR. SELBIN: Sure.

11 THE COURT: If I were to ask you to give yourself a
12 grade on your handling of this litigation, what grade would
13 you give?

14 MR. SELBIN: That's a fair question, Your Honor. And
15 I've actually thought quite a bit about that and gone back
16 and looked over the history of this case. And as I look back
17 over the history of this case, we made one mistake very early
18 on, which was that we put the wrong date on the notice, the
19 date by which we were going to post our fee application on
20 the settlement website. And that, Your Honor, found under
21 *Mercury Interactive*, required a re-noticing, for which we
22 took responsibility.

23 And so that mistake was an initial hiccup that was
24 resolved very quickly. And so I think that, looking over the
25 whole case, I would give us probably an A minus. I think our

1 one mistake was that initial mistake. And other than that,
2 there have been hiccups in the litigation, but they haven't
3 been of our making.

4 So Sallie Mae found additional class members on two
5 different occasions, and that required us to go back and
6 negotiate a new settlement on two different occasions.

7 THE COURT: Well, let me stop you, because I can't
8 accept the A minus. Mr. Palmer was responsible for me having
9 to go read that December court transcript. And I found you
10 standing at that very podium -- I think you were wearing a
11 different tie -- saying, "Judge, this is all just fine.
12 We're working through a couple loose details here, but sign
13 the settlement. Give approval." And what I hear, counsel,
14 is, "We've invested enough in this case. Get us paid." And
15 if I had done so at that time, we would have missed a
16 substantial portion of this class.

17 And, frankly, I don't think the lawyering has been very
18 good in this case. So, I mean, help me understand why you
19 give yourself an A minus, when we have had what you describe
20 as hiccups, but what I would describe as falling off the
21 cliff.

22 MR. SELBIN: Your Honor, if I may, I --

23 THE COURT: I mean, you can't blame Sallie Mae for
24 knowing who is in your class. That's not going to fly around
25 here.

1 MR. SELBIN: The problem with that, Your Honor, is
2 that they are the ones who had the information. It was
3 solely in their possession. And they presented us the
4 information in interrogatory responses. We did the work you
5 would expect lawyers to do to get that information.

6 So, in other words, we served interrogatories that asked
7 Sallie Mae to tell us how many people were in the class and
8 how many people fell into different categories, and they
9 answered those interrogatories. And so based on that
10 information, we thought we had all the information. And I'm
11 not sure what a reasonable lawyer would do in those
12 circumstances, beyond accepting the sworn discovery responses
13 of the defendant.

14 Now, as it turned out, they came to us and discovered that
15 they had missed some things. We came forward immediately to
16 the court and said, Your Honor, we need time to figure out
17 what's going on here. We took the deposition of Mr. Walter
18 on two occasions in order to ascertain what happened. We
19 served additional interrogatories. They answered additional
20 interrogatories.

21 So I really do believe, Your Honor, what I am fully
22 cognizant of and take responsibility for is our error on the
23 *Mercury Interactive* piece of this. We actually, as you will
24 recall, did post our -- we did post our fee application on
25 the website. We just put the wrong date in the notice as to

1 when we were going to do it.

2 Unquestionably, that was a mistake. Was it a big mistake?
3 I don't think that was a big mistake. It required us to then
4 put everything over. And I don't recall, Your Honor, saying
5 everything is fine, just fine, we want you to go ahead and
6 approve the settlement. You indicated pretty quickly at that
7 hearing that you were inclined to put things over, given all
8 of the loose ends that were out there.

9 But I believe, Your Honor, that we have done our job as
10 class counsel. We've worked hard in this case. We waived
11 any fees out of that additional money that was generated,
12 because we didn't feel like the Palmer folks could take
13 responsibility, equally. Frankly, we felt like that was
14 something that came about not because of us but because of
15 Sallie Mae.

16 So I stand by -- I hear Your Honor, but I stand by my A
17 minus. And I say that we made one mistake. The finding of
18 the additional class members was not something any reasonable
19 lawyer working diligently could have uncovered. It wasn't
20 information that we had access to. It was information that
21 we sought discovery on, and they provided us responses.

22 THE COURT: All right. Thank you.

23 MR. SELBIN: Very good, Your Honor. Thank you.

24 THE COURT: Ms. Strickland, Sallie Mae, do you wish
25 to be heard?

1 MS. STRICKLAND: No, Your Honor.

2 THE COURT: All right. Counsel, as I indicated, in
3 regards to the prior motion for approval, I do intend to
4 award some attorneys' fees. I wanted to have the advantage
5 of hearing what counsel had to say.

6 This case has not gone smoothly. And I would have
7 expected more from the quality of counsel that we have in the
8 room. I will grant you that the Ninth Circuit has some
9 unusual rules in regards to administration of class actions.
10 And the question in my mind at this time is, somewhere
11 between actual attorneys' fees and a lodestar factor,
12 particularly the lodestar factor recommended by the
13 plaintiffs in this matter, what is the appropriate amount?
14 So that is the question that I will answer, but know that you
15 will get paid. The question is: How much?

16 Counsel, anything further at this time?

17 MS. TERRELL: No, Your Honor.

18 MR. SELBIN: Nothing further here, Your Honor.

19 MS. STRICKLAND: Nothing, Your Honor.

20 THE COURT: All right. Then we'll be in recess.

21 Thank you.

22 MR. SELBIN: Thank you, Your Honor.

23 MR. PALMER: Thank you, Your Honor.

24 (Proceedings adjourned.)

25

C E R T I F I C A T E

I, Kari McGrath, CCR, CRR, RMR, Official Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

/S/ KARI McGRATH

Kari McGrath, CCR, CRR, RMR

Official Court Reporter